No. 17-71

In the Supreme Court of the United States

WEYERHAEUSER COMPANY, PETITIONER

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JEFFREY H. WOOD
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
JEFFREY E. SANDBERG
Assistant to the Solicitor General
ANDREW C. MERGEN
MARY HOLLINGSWORTH
J. DAVID GUNTER II
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the U.S. Fish and Wildlife Service (Service) properly determined that a portion of petitioner's land that was historically occupied by the endangered dusky gopher frog, and that continues to contain valuable habitat for the frog, is eligible to be designated as "critical habitat" under the Endangered Species Act of 1973, 16 U.S.C. 1532(5)(A)(ii).

2. Whether the Service's decision not to exercise its discretionary authority to exclude petitioner's land from critical habitat on grounds of economic impact is committed to agency discretion by law.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-77a) is reported at 827 F.3d 452. The opinion of the district court (Pet. App. 78a-122a) is reported at 40 F. Supp. 3d 744.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 2016. A petition for rehearing was denied on February 13, 2017 (Pet. App. 123a-162a). On March 27, 2017, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including June 29, 2017. On June 9, 2017, Justice Thomas further extended the time to and including July 13, 2017. The petition for a writ of certiorari was filed on July 11, 2017, and granted on January 22, 2018. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are set forth in the appendix to this brief. App., *infra*, 1a-23a.

STATEMENT

1. a. Congress enacted the Endangered Species Act of 1973 (Act), 16 U.S.C. 1531 *et seq.*, to provide "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved" and "a program for the conservation of such endangered species and threatened species." 16 U.S.C. 1531(b). Responsibility for administering the Act is shared by the Secretary of the Interior and the Secretary of Commerce. 16 U.S.C. 1532(15). The U.S. Fish and Wildlife Service (Service) implements the Act with respect to species under the jurisdiction of the Secretary of the Interior. 50 C.F.R. 402.01(b).

Section 4 of the Act directs the Service to identify species that are "endangered" or "threatened" and to list them by regulation published in the Federal Register. 16 U.S.C. 1533(a)(1)-(2) and (c)(1); see 50 C.F.R. 17.11-17.12.[1] When the Service lists a species as endangered or threatened, Section 4 also requires the Service, "to the maximum extent prudent and determinable," to issue a regulation that "designate[s] any habitat of such species which is then considered to be critical habitat." 16 U.S.C. 1533(a)(3)(A)(i); see 50 C.F.R. 17.95-17.96.

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[1] An "endangered species" is "any species which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. 1532(6). A "threatened species" is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. 1532(20).

Section 3 of the Act defines a species' "critical habitat" to include two kinds of areas: occupied and unoccupied. Occupied critical habitat consists of "the specific areas within the geographical area occupied by the species, at the time it is listed * * *, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." 16 U.S.C. 1532(5)(A)(i). Unoccupied critical habitat consists of "specific areas outside the geographical area occupied by the species at the time it is listed" if the Service "determin[es] * * * that such areas are essential for the conservation of the species." 16 U.S.C. 1532(5)(A)(ii). At all times relevant here, the Service's regulations allowed it to designate unoccupied critical habitat "only when a designation limited to [the species'] present range would be inadequate to ensure the conservation of the species." 50 C.F.R. 424.12(e) (2012).[2]

As noted, both occupied and unoccupied critical habitat are defined in reference to what is "essential" for "conservation" of the species. 16 U.S.C. 1532(5)(A)(i)-(ii). The Act defines "conservation" to mean "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." 16 U.S.C. 1532(3).

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[2] In 2016, the Service amended its regulations governing designation of critical habitat. 81 Fed. Reg. 7414 (Feb. 11, 2016). The Service has since agreed to reconsider those amendments as part of a litigation settlement. See *Alabama* v. *National Marine Fisheries Serv.*, 16-cv-593 Docket entry No. 55 (S.D. Ala. Mar. 15, 2018). Because the critical-habitat designation at issue here was governed by pre-2016 regulations, neither the 2016 amendments nor their pending reconsideration has any direct bearing on this case.

Such conservation measures include "all activities associated with scientific resources management," such as "habitat acquisition and maintenance, propagation, live trapping, and transplantation." *Ibid.*

Because "conservation" includes the goal of achieving a species' recovery—the point at which it is "no longer necessary" to list the species as endangered or threatened, 16 U.S.C. 1532(3)—"'[c]onservation' is a much broader concept than mere survival." *Sierra Club* v. *U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 441-442 (5th Cir. 2001). Accordingly, areas that are "essential to the conservation of the species," and therefore properly designated as critical habitat, may include "not only [areas] necessary for the species' survival but also [areas] essential for the species' recovery." *Gifford Pinchot Task Force* v. *United States Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004) (citation omitted); see also, *e.g.*, *Center for Native Ecosystems* v. *Cables*, 509 F.3d 1310, 1322 (10th Cir. 2007) ("[C]onservation encompasses recovery."); J.A. 128 ("[Conservation] is a broader standard than simply survival.").

Section 4 of the Act requires that, in designating critical habitat, the Service must rely on the "best scientific data available" and "tak[e] into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. 1533(b)(2). It also provides that the Service "may exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat," so long as "the failure to designate such area as critical habitat will [not] result in the extinction of the species concerned." *Ibid.* The Act otherwise

does not specify whether or when the Service should exercise its discretionary exclusion authority.

b. The listing of a species as endangered, and the designation of its critical habitat in turn, give rise to distinct legal consequences.

The Act establishes numerous protections applicable to the endangered species itself. For example, Section 9 of the Act generally makes it unlawful to "take" an endangered species, 16 U.S.C. 1538(a)(1)(B)-(C), meaning to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect [the species], or to attempt to engage in any such conduct," 16 U.S.C. 1532(19). Such unlawful "tak[ing]" includes "habitat modification that results in actual injury or death to members of an endangered or threatened species." *Babbitt* v. *Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 697 (1995). The Act also forbids the import, export, possession, transportation, or sale of endangered species. 16 U.S.C. 1538(a)(1)(A) and (D)-(F). Those prohibitions, applicable to both private and governmental actors, are enforceable through criminal and civil penalties. 16 U.S.C. 1540(a)-(b).

By contrast, the designation of a species' critical habitat "does not impose a legally binding duty on private parties." J.A. 119. Instead, Section 7 of the Act requires "[e]ach Federal agency" to, "in consultation with and with the assistance of the [Service], insure that any action authorized, funded, or carried out by such agency * * * is not likely" either to "jeopardize the continued existence" of the listed species, 16 U.S.C. 1536(a)(2), or to "result in the destruction or adverse modification of habitat of such species which is determined by the [Service] * * * to be critical," *ibid.* If this consultation process demonstrates that a proposed agency action is likely to jeopardize a species or destroy or adversely modify its

critical habitat, the Service is required to issue a biological opinion that "suggest[s] * * * reasonable and prudent alternatives" to the proposed action, if available. 16 U.S.C. 1536(b)(3)(A); see 50 C.F.R. 402.02 (defining such alternatives). The federal agency may then choose either to "terminate the [proposed] action, implement the proposed alternative, or seek an exemption from the Cabinet-level Endangered Species Committee." *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 652 (2007); see 50 C.F.R. 402.15. This Section 7 consultation process is only required, however, if the proposed action involves "'discretionary Federal involvement or control'" rather than implementation of a "mandatory agency directive[]." 551 U.S. at 666 (quoting 50 C.F.R. 402.03).

Because Section 7 is triggered only when an independent federal nexus exists, the designation of private land as critical habitat "[i]n many cases * * * may have little or no impact on activities within the area of the habitat." H.R. Rep. No. 1625, 95th Cong., 2d Sess. 10 (1978) (*1978 House Report*). Such a designation "does not allow the government or public to access private lands"; "does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners"; and does not "affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area." J.A. 140; see J.A. 119-120; Pet. App. 2a. Thus, although the designation may ultimately have consequences for the use or value of private land, such land is affected only if a project requires discretionary action by a federal agency.

2. a. The dusky gopher frog (*Rana sevosa*) was listed as an endangered species in 2001. 66 Fed. Reg. 62,993.[3] The frog breeds in isolated ephemeral ponds—

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[3] The frog was then known as the "Mississippi gopher frog." 66 Fed. Reg. at 62,993.

ponds not connected to other water bodies and that exist only seasonally—and then spends most of its adult life in tree stumps, holes, or burrows created by other species. *Id.* at 62,994. Thus, the frog's "habitat includes both upland sandy habitats historically forested with longleaf pine and isolated temporary wetland breeding sites embedded within the forested landscape." *Ibid.*; see J.A. 56-57 (photographs of frog and habitat).

The dusky gopher frog is "one of the most imperiled species (or sub-species) in the United States." J.A. 45. According to historical records, the frog at one time lived throughout parts of Alabama, Louisiana, and Mississippi. 66 Fed. Reg. at 62,994; see J.A. 58 (historical range). By 2001, however, the Service knew of only one population surviving in the wild: approximately 100 adult frogs at a single pond (Glen's Pond) in Harrison County, Mississippi. 66 Fed. Reg. at 62,995; see J.A. 56 (photograph of Glen's Pond). The "primary factor" in the frog's decline was "urbanization and conversion of forest to pine plantation." 66 Fed. Reg. at 62,994-62,995. The Service found that the species' continued existence was endangered by its small population and the fragmentation and destruction of its habitat. *Id.* at 62,997-63,000.

Since 2001, naturally occurring dusky gopher frogs have been seen at two other sites in an adjacent county (Jackson County, Mississippi), and another population was established there through translocation. U.S. Fish & Wildlife Serv., *Dusky Gopher Frog* (Rana sevosa) *Recovery Plan* 6-7 (2015), http://perma.cc/C9TQ-DJZU (*Recovery Plan*). Nonetheless, as of 2015, only an estimated "minimum of 135 individual adult frogs survive in the wild." *Id.* at iv. Almost all are at Glen's Pond, which is "the only population that is considered stable." *Id.* at 7.

Accordingly, "the dusky gopher frog remains critically endangered." U.S. Fish & Wildlife Serv., *Dusky Gopher Frog* (Rana sevosa) *Five-Year Review: Summary and Evaluation* 3 (2015), http://perma.cc/24DJ-KQHP. "The establishment of additional populations" of the frog remains "critical to protect the species from extinction and provide for the species' eventual recovery." J.A. 115.

b. When the Service listed the frog as endangered in 2001, it did not have resources available to immediately designate the frog's critical habitat. 66 Fed. Reg. at 63,000. In 2007, respondent Center for Biological Diversity sued the Service challenging its failure to designate critical habitat. That suit ended in a court-approved settlement. J.A. 103.

The Service published an initial proposed designation in 2010, which included both occupied and unoccupied critical habitat. 75 Fed. Reg. 31,387. To determine the frog's "occupied" critical habitat, the Service identified the "physical or biological features" that were "essential to the conservation of the species" and that "may require special management considerations or protection." 16 U.S.C. 1532(5)(A)(i). The Service's proposed rule identified three "primary constituent elements" (PCEs) that it found "essential" for the frog's conservation. 75 Fed. Reg. at 31,391; cf. 50 C.F.R. 424.12(b) (2012). These "PCEs" were: (1) isolated, ephemeral ponds in which the frog may breed, with specified canopy, vegetation, water-quality, and land-management characteristics; (2) "[u]pland forested nonbreeding habitat," also with various specified characteristics; and (3) "upland connectivity habitat between breeding and nonbreeding habitats." 75 Fed. Reg. at 31,393, 31,404.

The Service found that the four Mississippi sites occupied by the frog contained those features, and it proposed to designate each as critical habitat. *Id.* at 31,395.

The Service also proposed to designate seven areas in Mississippi as unoccupied critical habitat. The Service noted that the few sites occupied by the frog were "highly localized and fragmented," leaving them "highly susceptible to random events" such as drought and disease. 75 Fed. Reg. at 31,394. The Service thus concluded that maintaining "suitable habitat" in the unoccupied areas was "essential to decrease the potential risk of extinction of the species resulting from stochastic events and provide for the species' eventual recovery." *Id.* at 31,397.

The Service obtained peer review of its proposal by six specialists with expertise concerning the frog and related species, the region's geography and ecology, and conservation-biology principles. J.A. 105-108. The reviewers were "united in their assessment" that the Service's proposed critical-habitat designation was "inadequate for the conservation of the dusky gopher frog." J.A. 124. The reviewers emphasized that the frog would be at greater "risk of extirpation" from localized threats such as "drought or disease" if critical habitat was limited to "southern Mississippi." J.A. 13-14. The reviewers therefore urged the Service to "look within the species' historic range outside the state of Mississippi for additional habitat for the designation." J.A. 124.

The Service then undertook to identify additional habitat within the species' historical range. As noted, although the frog lives most of its adult life belowground in forested uplands, its breeding site is "an isolated pond * * * that dries completely on a cyclic basis." 66 Fed. Reg. at 62,994. Such a pond must retain water long

enough to "allow hatching, development, and metamorphosis" of the frog, but not so long as to support fish that prey on the frog's eggs or larvae. *Ibid.*; see J.A. 122. Given the "importance [of such ponds] to survival of the species," and the "rarity of open-canopied, isolated, ephemeral ponds" within the frog's historical range, the Service focused its efforts specifically on breeding habitat. J.A. 124; see J.A. 158.

One of the peer reviewers, Dr. Joseph Pechmann, called the Service's attention to a site in St. Tammany Parish, Louisiana. J.A. 14. This site, later designated "Unit 1," was the last known site inhabited by dusky gopher frogs outside of Mississippi; the frog was last seen there in 1965. J.A. 167. Unit 1 includes five isolated ephemeral ponds and associated uplands on private property managed for timber operations. J.A. 166-167. Dr. Pechmann advised that Unit 1 "contains the best remaining collections of breeding ponds for gopher frogs in Louisiana and some of the best ponds available anywhere in the historic range of the frog." Administrative Record (A.R.) 2408. He further observed that, although the surrounding "terrestrial habitat" was "currently in commercial pine plantations," the habitat "retain[ed] some stump holes" in which adult frogs could live and "could be restored" into optimal terrestrial habitat. J.A. 14. With petitioner's consent, the Service conducted a field visit to Unit 1. See J.A. 17-20 (photographs from visit); A.R. 6734-6779 (additional photographs).

3. a. Following a revised proposed designation, additional peer review, public comment, and a public hearing, the Service finalized its designation of critical habitat in 2012. J.A. 99-199 (77 Fed. Reg. 35,118). Its final rule designated 6477 acres of critical habitat, all within the frog's historical range. J.A. 100; see J.A. 165-180. The Service

included 1544 acres of Unit 1, finding the area to be "essential for the conservation of the species." 16 U.S.C. 1532(5)(A)(ii); see J.A. 166-167.

The Service found that Unit 1 provides "[b]reeding habitat for the dusky gopher frog in a landscape where the rarity of that habitat is a primary threat to the species." J.A. 126. The Service explained that the five ephemeral ponds not only remained "intact and of remarkable quality," J.A. 160, but were "similar to ponds where dusky gopher frogs currently breed in Mississippi," J.A. 125. Indeed, the Service determined that, "[b]ased on the best scientific information available," the "five ponds in Unit 1 provide breeding habitat that in its totality is not known to be present elsewhere within the historic range of the dusky gopher frog." *Ibid.*; see J.A. 160 ("[N]o group of five ponds such as these was found" in Mississippi.). The Service further explained that "[i]f dusky gopher frogs are translocated to the site, the five ponds are in close enough proximity to each other that adult frogs could move between them and create a meta-population, which increases the chances of the long-term survival of the population." J.A. 167; cf. *Recovery Plan* 33-34 (discussing "metapopulations"). At the same time, the Service found that Unit 1's distance from other critical habitat "likely provides protection from environmental stochasticity," such as droughts or disease. J.A. 126. The Service therefore concluded that "[m]aintaining the five ponds within this area as suitable habitat" is "essential to decrease the risk of extinction of the species resulting from stochastic events and [to] provide for the species' eventual recovery." J.A. 167; see *Recovery Plan* 4 (similar).

The Service acknowledged that the uplands of Unit 1 were then "poor quality terrestrial habitat" for the frog.

J.A. 160. But it found that the uplands would be "restorable with reasonable effort" to meet the standards deemed essential for the frog's long-term recovery. J.A. 167. Dr. Pechmann's analysis supported this view. J.A. 14, 52-53; A.R. 2408 ("It's much easier to restore a terrestrial habitat for the gopher frog than to restore or build breeding ponds.").

The Service also acknowledged that it could not compel Unit 1's owners to allow the frog's return. J.A. 122-123. But it "hope[d] to work with the landowners to develop a strategy that will allow them to achieve their objectives" while also "protect[ing] the isolated, ephemeral ponds that exist there." J.A. 123. The Service noted that federal funds may be available for such efforts. *Ibid.*

b. As required by the Act, see 16 U.S.C. 1533(b)(2), the Service considered the economic impact of its critical-habitat designation. J.A. 184-190. After considering the record, including a detailed economic analysis performed by a consultant, see J.A. 63-98 (excerpts), the Service found "considerable uncertainty" concerning the economic impact upon Unit 1. J.A. 188. The Service noted that the designation would not affect the current use of Unit 1 for timber operations—inasmuch as no federal approvals are required to continue that activity—and it observed that the "timber lease on the[] property does not expire until 2043." J.A. 123.

The Service noted that Unit 1's landowners hoped eventually to undertake residential and commercial development. But the Service found it unclear whether "a Federal nexus for development activities" would ever exist. J.A. 188. The Service observed that Section 7 consultation would be triggered if Unit 1 were determined to contain "jurisdictional wetlands" and if the landown-

ers proposed to discharge fill material into those wetlands. *Ibid.*; see 33 U.S.C. 1344(a). But the Service found it uncertain whether the Clean Water Act, 33 U.S.C. 1251 *et seq.*, would require a discharge permit. J.A. 188-189; see *Solid Waste Agency of N. Cook Cnty.* v. *United States Army Corps of Eng'rs*, 531 U.S. 159, 171-172 (2001) ("navigable waters" did not include "isolated ponds, some only seasonal, wholly located within two Illinois counties" based on presence of migratory birds); see also *Rapanos* v. *United States*, 547 U.S. 715, 733-734 (2006) (plurality opinion); cf. *Recovery Plan* 21 (contemplating that "isolated wetlands, such as dusky gopher frog breeding sites," may not fall "under Federal jurisdiction").

Lacking definitive information about the landowners' plans and the jurisdictional status of Unit 1's ponds, the Service posited three hypothetical economic-impact scenarios. J.A. 77. In the first scenario, future uses of Unit 1 would not require any federal permits and thus would not trigger Section 7 consultation, and the critical-habitat designation would therefore "not result in any incremental economic impact." J.A. 68.

In the second and third scenarios, the Service assumed that future development of Unit 1 would both occur and require a Clean Water Act permit. Scenario 2 posited that, after consultation, the landowners would develop 40% of the site and set aside 60% for conservation, which would "provide a meaningful conservation benefit to the gopher frog." J.A. 84. The Service calculated the economic impact in this scenario at $20.4 million. J.A. 91.

Scenario 3 posited that 100% of the site would be required for conservation and that no Clean Water Act permit would issue, with an estimated economic impact of $33.9 million. J.A. 92. The Service found this scenario

unlikely, however, because "virtually all" projects "can be implemented successfully with, at most, the adoption of reasonable and prudent alternatives." J.A. 120. The Service stated that "if the landowners agree to allow the Service to re-introduce the gopher frog in a portion of the unit, the Service anticipates the remainder would be available for development activities." J.A. 84.

The Service then considered whether to exercise its discretionary authority to exclude Unit 1 on the basis that "the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." 16 U.S.C. 1533(b)(2); see J.A. 189-190. The Service found that the designation would have substantial conservation benefits "in biological terms." J.A. 189. The Service further observed that "[its] economic analysis did not identify any disproportionate costs that are likely to result from the designation." J.A. 190. Accordingly, the Service declined to "exercis[e] [its] discretion to exclude any areas from th[e] designation of critical habitat." *Ibid.*

4. Petitioner Weyerhaeuser Company owns part of Unit 1, leases the remainder, and currently manages the land for commercial timber production. See Pet. Br. 16; Markle Br. 6, 12. Petitioner or its predecessor has leased Unit 1 and its surrounding lands since 1953, and its current lease will expire in 2043. J.A. 80-81 & n.81. Petitioner has also reached an understanding with other landowners to develop the property "when market conditions are amenable." J.A. 80; cf. J.A. 81 n.81 (reporting landowner statement that such development "would not occur until 2043").

In 2013, petitioner and other landowners, including respondents Markle Interests, LLC *et al.* (collectively plaintiffs), brought suit in the Eastern District of Louisiana challenging the Service's designation of Unit 1 as

unoccupied critical habitat. Plaintiffs asserted, *inter alia*, that the Service's actions violated the Endangered Species Act and the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, and exceeded Congress's authority under the Commerce Clause. The district court consolidated the suits and allowed respondents Center for Biological Diversity and Gulf Restoration Network to intervene as defendants.

The district court entered summary judgment for the Service. Pet. App. 78a-122a. The court held that the Service's determination of critical habitat was consistent with the Act and that its finding that Unit 1 was essential for the frog's conservation was adequately supported by the administrative record. *Id.* at 102a-110a. The court also concluded that because "[t]he record confirm[ed] that [the Service] considered potential economic impacts" and "costs associated with Section 7 consultation," the Act did not allow it to second-guess the agency's judgment that the "impacts to Unit 1 were not disproportionate." *Id.* at 117a-118a.

5. a. The court of appeals affirmed. Pet. App. 1a-77a.

The court of appeals concluded that the Service's designation of Unit 1 as unoccupied critical habitat was consistent with the Act and supported by the administrative record. Pet. App. 15a-32a. The court noted that plaintiffs had not challenged the Service's finding that a designation limited to the frog's occupied habitat would be inadequate, *id.* at 17a, nor had they "dispute[d] the scientific or factual support for the Service's determination[s]" concerning the value of Unit 1, *id.* at 20a-21a. The court concluded that the Service's interpretation of the term "essential" was reasonable and "entitled to *Chevron* deference," *id.* at 22a, and it upheld the Ser-

vice's designation after finding that "*in this case*, substantial, consensus, scientific evidence in the record supports the Service's conclusion" that Unit 1 was essential for the frog's conservation, *id.* at 30a n.20. In particular, the court emphasized that Unit 1 contains isolated ephemeral ponds that are rare, critical to the frog's survival, and difficult to reproduce elsewhere. *Id.* at 29a.

The court of appeals also rejected plaintiffs' argument that the Service erred by declining to exclude Unit 1 from the critical-habitat designation on economic-impact grounds. Pet. App. 32a-36a. The court concluded that that claim was unreviewable because the Act sets forth "no manageable standards for reviewing the Service's decision not to exercise [that] discretionary authority." *Id.* at 34a.

Judge Owen dissented. Pet. App. 48a-77a. She expressed the view that Unit 1 was not "essential for the conservation" of the frog because the area currently "plays no part in the conservation of that species," *id.* at 48a, and there was "no reasonable probability that it could actually be used for conservation" in light of plaintiffs' opposition, *id.* at 61a; see *id.* at 49a-50a, 59a-63a.

b. Plaintiffs sought rehearing en banc, which was denied. Pet. App. 123a-162a. Judge Jones, joined by five judges, dissented from the denial. *Id.* at 124a-162a. Based on her assumption that Unit 1 is "uninhabitable" by the dusky gopher frog, *id.* at 128a, Judge Jones opined that Unit 1 was categorically ineligible to be designated as critical habitat. Judge Jones also disagreed with the panel's conclusion that the Service's decision not to exclude Unit 1 was committed to the agency's discretion. *Id.* at 156a-162a.

SUMMARY OF ARGUMENT

I. The Service properly determined that Unit 1 both contains "habitat" and is "essential for the conservation" of the dusky gopher frog.

A. Petitioner's argument that Unit 1 is not "habitat" rests on flawed factual and legal premises. The record shows that the Service found that Unit 1 constitutes "habitat" for the frog: it contains the isolated ephemeral ponds needed for the frog's breeding, as well as terrestrial habitat that could be inhabited by adult frogs.

Petitioner's contrary assumption demonstrates its mistaken conflation of statutory concepts. Although the Service found that Unit 1 does not yet contain all of the biological and physical features associated with occupied "critical habitat," the absence of those features does not mean that Unit 1 does not qualify as "habitat." Rather, it simply means that reasonable restoration would be needed, consistent with the Act's understanding that "conservation" may require habitat improvements to promote a species' recovery. Moreover, the Service's finding that Unit 1 contains "habitat" accords with the Service's longstanding, common-sense interpretation, which reflects the best understanding of the statutory term and, at the very least, merits deference.

B. The Service also properly determined that Unit 1 is an "area" unoccupied by the frog that is "essential for [its] conservation." 16 U.S.C. 1532(5)(A)(ii). The Service found that Unit 1 not only contains the frog's rare breeding habitat, but the best such habitat within the frog's entire historical range. Unit 1 would also provide protection from extinction in the event that the few remaining populations, clustered in two Mississippi counties, were extirpated through drought, disease, or an-

other localized event. Moreover, Unit 1 could be restored with "reasonable effort," distinguishing it from other historically occupied sites where such restoration is not readily feasible.

II. The Service's decision not to exercise its discretionary authority to exclude Unit 1 from critical habitat on economic-impact grounds is unreviewable under 5 U.S.C. 701(a)(2) because it is committed to agency discretion by law. The first sentence of Section 4(b)(2), mandating that the Service "tak[e] into consideration" the "economic impact" of a designation, establishes a judicially enforceable requirement. 16 U.S.C. 1533(b)(2). By contrast, the second sentence provides only that the Service "may" exclude an area from critical habitat if it finds the benefits of exclusion outweigh those of inclusion. *Ibid.* And although the statute specifies that the Service *may not* exclude an area from critical habitat if it would lead to the species' extinction, it does not provide standards for determining when the Service *should* or *must* exclude it. The statute thus provides no meaningful standard against which to judge the agency's exercise of discretion.

ARGUMENT

I. THE SERVICE PROPERLY DESIGNATED UNIT 1 AS UNOCCUPIED CRITICAL HABITAT

The Service's designation of Unit 1 as unoccupied critical habitat must be upheld unless it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). There is no basis to set aside the Service's designation under that standard.

A. Unit 1 Contains "Habitat" For The Dusky Gopher Frog

In the court of appeals, petitioner argued that Unit 1 could not be unoccupied critical habitat on the theory that it is not "essential for the conservation of the species" under the definition in Section 3(5)(A)(ii) of the Act, 16 U.S.C. 1532(5)(A)(ii). See Pet. C.A. Br. 19-21, 27-41. In this Court, however, petitioner now argues (Pet. Br. 19, 22-23; see Markle Br. 26-27) that the designation is inconsistent with Section 4(a)(3)(A)(i), which directs the Service to "designate any habitat of such species which is then considered to be critical habitat." 16 U.S.C. 1533(a)(3)(A)(i). Observing that the Act contemplates that a species' "critical habitat" is part of its "habitat," petitioner argues that Unit 1 cannot be critical habitat "as a matter of law" because, it asserts, Unit 1 is not "habitat" in the first instance. Pet. Br. 19. That assertion rests on mistaken premises about the factual record and the meanings of "habitat" and "critical habitat" under the Act.

1. The Service found that Unit 1 contains "habitat" for the dusky gopher frog

The Service's final designation of Unit 1 found it to contain "habitat" for the dusky gopher frog.

a. As noted, see pp. 9-10, *supra*, Unit 1 was identified after peer reviewers criticized the initial proposed designation as inadequate. The Service then "look[ed] within the species' historic range outside the state of Mississippi for additional habitat for the designation." J.A. 124. One reviewer, Dr. Pechmann, alerted the Service to "[t]he pond where *Rana sevosa* was last documented in Louisiana" and "[a]nother pond located nearby." J.A. 14. Dr. Pechmann noted that these ponds "retain[ed] the required characteristics necessary to serve as a breeding pond." *Ibid.* And with respect to the frog's "terrestrial

habitat," Dr. Pechmann advised that the upland area "retains some stump holes" in which frogs could live and observed that the uplands "could be restored" to meet the Service's conservation standards. *Ibid.*

The Service performed a "habitat assessment" of Unit 1. J.A. 160; cf. J.A. 123 ("During the process of delineating critical habitat, the Service assesses habitat to determine if it is essential for the conservation of a listed species."). The Service concluded that the five ponds in Unit 1 "provide breeding habitat that in its totality is not known to be present elsewhere within the historic range of the dusky gopher frog." J.A. 125. The isolated, ephemeral ponds were "intact and of remarkable quality," J.A. 160, and "similar in appearance (water clarity, depth, vegetation) to ponds in Mississippi used for breeding," *ibid.*

The Service also found that Unit 1 contained "terrestrial habitat" in which adult frogs could live. J.A. 160. Field notes of one Service official reflected observations of various "[s]tumps" in the "uplands" surrounding the ephemeral ponds, some which were "[one] foot to 10 in[ches]" and "others smaller," as well as "stumps / root mounds surrounding th[e] pond basin" at "Dry Pond." A.R. 3080. Dr. Pechmann's notes similarly reflected "lots of stumps" near various ponds and a "good gopher frog hole" near Dry Pond. A.R. 3099-3100; see J.A. 18; A.R. 6744.

The Service noted that this "terrestrial habitat" was of "poor quality," J.A. 160; see A.R. 3080 ("would prob. need to create more frog refugia"), but concluded that those uplands were "restorable with reasonable effort," J.A. 167. Such restoration would "*improve* [the] *habitat* for the dusky gopher frog" at Unit 1 so as to attain stand-

ards for the frog's long-term conservation. J.A. 123 (emphasis added); see J.A. 167 (noting that "the uplands associated with the ponds do not currently contain the essential physical or biological features of *critical* habitat") (emphasis added). And as Dr. Pechmann noted, even without improvements, Unit 1 already "contain[ed] the *best gopher frog habitat* remaining in Louisiana, to [his] knowledge." J.A. 53 (emphasis added).

In finding Unit 1 to be habitat, the Service also observed that the frog had previously inhabited the area. Unit 1 contained "at least two historic breeding ponds for the dusky gopher frog," J.A. 124, and the last sighting of the frog anywhere outside Mississippi had occurred at Unit 1, J.A. 167. And Unit 1's ponds—unlike other wetlands throughout the frog's historical range—today remain "intact and of remarkable quality." J.A. 160.

The Service's designation of Unit 1 as unoccupied critical habitat thus subsumed a determination that Unit 1 contained, albeit with varying degrees of quality, the basic elements of "habitat" required during the dusky gopher frog's life cycle. Indeed, petitioner and Markle did not contend otherwise in their comments during the rulemaking process, see A.R. 1825-1839, 1692-1711; p. 25 n.5, *infra*, and they disclaimed any attempt to "challenge any of the[] [Service's] premises as a factual matter" on judicial review, Pet. C.A. Br. 36.

b. Petitioner asserts that "[i]f dusky gopher frogs were moved to Unit 1, they would not survive." Pet. Br. 25; see *id.* at 19, 35, 43 (similar). But petitioner does not dispute any of the facts just described. Petitioner does not contend, for example, that Unit 1 lacks isolated ephemeral ponds in which the frog could breed or forests with stump holes in which adult frogs could live. Rather, petitioner's assertion rests solely on a presumed absence

of any "[]dispute[]" that "the frog cannot live in Unit 1." *Id.* at 19.

Petitioner's assertion is mistaken. It is true that the Service found that "the uplands associated with the ponds" at Unit 1 do not "currently contain the *essential physical or biological features* of *critical* habitat." J.A. 167 (emphasis added). But that finding does not mean that the dusky gopher frog "would immediately die if moved" to Unit 1. Pet. Br. 28. Rather, it simply means that the upland habitat is of relatively poor quality and would require some restoration as part of long-term conservation efforts.[4]

2. Under the Act, an area may be "habitat" even if it does not satisfy the standards for "occupied" "critical habitat"

What the Service's findings illustrate—and what petitioner's argument erroneously elides—is the distinction under the Act between "habitat" and "occupied" "critical habitat."

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[4] Petitioner's assertion that "[i]t is undisputed" that "the frog cannot live in Unit 1" (Pet. Br. 19; see also *id.* at 24-25) mischaracterizes the government's position. The government has consistently argued that Unit 1 contains habitat for the frog. See, *e.g.*, Gov't Br. in Opp. 23 (observing that "the Service never concluded that Unit 1 is not 'habitat' or is 'uninhabitable' by the frog," and noting that petitioner was "mistaken[]" in "declaring it 'undisputed' that Unit 1 is not 'habitat'") (citation omitted); Gov't C.A. Br. 29, 32 (explaining that "the Service found that the uniquely valuable ephemeral ponds found on Unit 1 constituted habitat that is essential to the conservation of the frog," and disputing assertion that "Unit 1 is 'unsuitable' as habitat"); D. Ct. Doc. 91-1, at 1 & n.1, 15 (Feb. 21, 2014) (arguing that petitioner's suggestion that "Unit 1 is 'not actually habitat at all'" was "baseless," because Unit 1 contains both "the best frog breeding habitat, in its totality, in the species' range" and "underground refugia that would allow for survival") (citation omitted).

Section 4 of the Act directs the Service, "to the maximum extent prudent and determinable," to promulgate a regulation that "designate[s] *any habitat* of such species which is then considered to be *critical habitat*." 16 U.S.C. 1533(a)(3)(A)(i) (emphasis added). The Act thereby contemplates that a species' "critical habitat" is part of its "habitat." But Section 4 provides no further guidance as to what areas of "habitat" are of sufficient value or importance to the species that they are "considered to be critical."

That guidance is instead provided in Section 3 of the Act, which defines "critical habitat." Section 3(5)(A)(i) provides that a species' "occupied" habitat is "critical" if it contains "physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." 16 U.S.C. 1532(5)(A)(i). At relevant times, the Service's regulations described this set of features in terms of the "[p]rimary constituent elements" (PCEs) of critical habitat. 50 C.F.R. 424.12(b) (2012). These are elements that the Service has found essential to achieving a species' "conservation," including its ultimate recovery. See *ibid.*

The PCEs do not, however, define requirements for "habitat" itself. The statutory text on which the PCEs are based—"physical or biological features * * * essential to the conservation of the species"—appears in the Act's definition of "occupied" "critical habitat," not in any definition of "habitat." As petitioner acknowledges, "'critical habitat' [is] a *subset* of 'habitat of such species,'" Pet. Br. 3 (emphasis added), and "Congress envisioned critical habitat to be *at most coextensive with*, and almost always narrower than, all habitable areas," *id.* at 26. Indeed, the Act provides that occupied critical habitat con-

sists of "*specific areas within* the geographical area occupied by the species" that possess the requisite biological and physical features. 16 U.S.C. 1532(5)(A)(i) (emphasis added); see also 16 U.S.C. 1532(5)(C). If, however, a species' "habitat" were itself required to contain all of the same biological and physical features necessary to constitute occupied critical habitat, a species' "habitat" would automatically qualify as "critical habitat" so long as it was occupied. The definition of occupied "critical habitat" would then be redundant with occupied "habitat," in contravention of basic principles of statutory interpretation. See *Rubin* v. *Islamic Republic of Iran*, 138 S. Ct. 816, 824 (2018).

The Service's final designation in this case reflects the understanding that the PCEs are criteria of occupied critical habitat that are directed at conservation of the entire species, not minimal requirements for "habitat" for members of the species. As petitioner notes, PCE 2 contemplates that the uplands would be "maintained by fires frequent enough to support an open canopy and abundant herbaceous ground cover." Pet. Br. 2; see *id.* at 12, 25, 27. But the Service identified such "frequent fires" as a feature of "[o]*ptimal* habitat," not of "habitat" itself. J.A. 145 (emphasis added); see also *Recovery Plan* iv (defining "[o]*ptimal* post-larval dusky gopher frog habitat" as "uplands dominated by *fire-maintained* longleaf pine") (emphasis added).

3. The Service's understanding that Unit 1 is "habitat" reflects the best reading of the statute and, at a minimum, warrants deference

Because the arguments petitioner now makes concerning the meaning of "habitat" were not presented to the Service during the rulemaking, the Service's final

designation did not have occasion to address them.[5] Nonetheless, the conclusion that Unit 1 contains "habitat" accords with both common sense and the Service's longstanding interpretation. Petitioner's contrary arguments are without merit.

a. Section 4 of the Act generally directs the Service to "designate *any habitat* of such species which is then considered to be *critical habitat*." 16 U.S.C. 1533(a)(3)(A)(i) (emphasis added). Although the Act expressly defines "critical habitat," see 16 U.S.C. 1532(5)(A)(i)-(ii), it does not define "habitat" itself. Instead, Congress left interpretation of that term for the Service in its implementation of the Act.

In lieu of formulating a single, bright-line definition of "habitat" to apply across all of the disparate species and settings to which the Act applies—including not only animals (both vertebrates and invertebrates) but also plants; not only terrestrial species but also aquatic species; not only stationary species but also migratory ones—the Service has developed its understanding of "habitat" through case-by-case application. And through critical-habitat designations for individual species, the

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[5] Plaintiffs focused their comments on the assertion that Unit 1 failed to possess the PCEs, not that it was not "habitat" *simpliciter*. See A.R. 1826 (petitioner's comment letter) (asserting that Unit 1 "is not 'essential' to the conservation of the [dusky gopher frog]" because it "contains none of the primary constituent elements" and will likely "continue to become *less favorable* habitat over the foreseeable future") (emphasis added); A.R. 1833 ("In conclusion, it does not presently appear that [Unit] 1 contains any of the three PCEs to qualify for consideration as *critical* habitat.") (emphasis added); A.R. 1701 (Markle *et al.* comment letter) (asserting that Unit 1 "fails to meet the statutory criteria" because it "contains none of the primary constituent elements" and "is not 'essential' to the conservation of the [dusky gopher frog]").

Service has made clear that a species' "habitat" is not limited to areas that simultaneously provide optimal conditions for every stage of a species' life cycle.

First, an area may qualify as "habitat" even if it does not contain every single element necessary for a species' survival. For example, a wetland area may serve as "habitat for migratory birds," *Solid Waste Agency of N. Cook Cnty.* v. *United States Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001) (*SWANCC*), even if they spend only part of their lives there. Even species that do not migrate great distances may nonetheless require several distinct "habitat[s]" during their life; many amphibians, for example, require aquatic habitat as juveniles and terrestrial habitat as adults. The Service thus understands the phrase "any habitat" to encompass each of the various habitats required by a species during its life cycle. See, *e.g.*, 82 Fed. Reg. 39,160, 39,218 (2017) (noting distinct "spawning habitat" and "nursery and foraging habitat" of Atlantic sturgeon); 79 Fed. Reg. 69,312, 69,323 (2014) (identifying "seasonally specific PCEs" for Gunnison sage-grouse and noting "few areas would contain all" PCEs); accord J.A. 125 (referring to "breeding habitat" of dusky gopher frog); cf. *Home Builders Ass'n* v. *United States Fish & Wildlife Serv.*, 616 F.3d 983, 988 (9th Cir. 2010) (When "the elements necessary to species survival are present in distinct areas," there is "simply no reason that [all] elements essential for the conservation of a species need be present in the same area."), cert. denied, 562 U.S. 1217 (2011).

Second, an area may be "habitat" even if it is poor quality or "degraded." See 73 Fed. Reg. 61,936, 61,938 (2008) (referring to "degraded habitat" that would "support unsustainable populations" of San Bernardino kangaroo rat, but would "not contribute to [its] recovery"), vacated

on other grounds by *Center for Biological Diversity* v. *United States Fish & Wildlife Serv.*, No. 09-cv-90, 2011 WL 73494 (C.D. Cal. Jan. 8, 2011); 56 Fed. Reg. 40,002, 40,007 (1991) (referring to "poor-quality habitat" for northern spotted owl); accord J.A. 160 (referring to uplands on Unit 1 as "poor quality terrestrial habitat"). Similarly, a species' "habitat" may include "marginal" areas that are not consistently inhabited or that would primarily be useful to help a species recover from a catastrophic event. See, *e.g.*, 73 Fed. Reg. at 61,962 (designating "marginal habitat" as critical habitat for San Bernardino kangaroo rat); 67 Fed. Reg. 40,790, 40,793 (2002) (contrasting "marginal" habitat with "stable aquatic habitats" for Chiricahua leopard frog).

Relatedly, habitat remains "habitat" even if it would require human intervention (such as restoration) to become optimal for a species' long-term conservation. See 78 Fed. Reg. 8746, 8758 (2013) (designating, as unoccupied critical habitat for tidewater goby, habitat areas in which "some form of restoration will be necessary"); J.A. 154 (noting that even "occupied" areas may require management to "maintain or restore the PCEs"); cf. Pet. App. 108a n.28 (agreeing that "it does not make sense" to limit designations of critical habitat to "only those areas that contain optimal conditions for the species").

Third, in appropriate circumstances, a species' "habitat" may include not only the area where a species is found, but also parts of the surrounding area that provide elements necessary to maintain the species. See, *e.g.*, *Bear Valley Mut. Water Co.* v. *Jewell*, 790 F.3d 977, 993-994 (9th Cir. 2015) (upholding designation of sub-unit of critical habitat for Santa Ana sucker that provides coarse sediment for spawning elsewhere in unit), cert. denied, 136 S. Ct. 799 (2016); cf. Pet. C.A. Br. 29-30 (agreeing

that the Service "rationally explain[ed]" in *Bear Valley* why that sub-unit "was essential"); see also 81 Fed. Reg. 59,046, 59,064 (2016) (designating adjacent upland areas that provide necessary water quality for yellow-legged frog); 78 Fed. Reg. 10,450, 10,458 (2013) (designating upstream areas that provide necessary sediment for Coachella valley milkvetch).

b. The Service's interpretation of "habitat" reflects the best reading of the Act. In construing statutory text, this Court "look[s] to both 'the language itself [and] the specific context in which that language is used.'" *Merit Mgmt. Grp., LP* v. *FTI Consulting, Inc.*, 138 S. Ct. 883, 893 (2018) (quoting *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997)) (second set of brackets in original). Here, "habitat" must be interpreted in light of the closely related term "critical habitat." Critical habitat is a subset of habitat and is statutorily defined to include both "areas *within* the geographical area occupied by the species" and "areas *outside* the geographical area occupied by the species." 16 U.S.C. 1532(5)(A)(i)-(ii) (emphasis added). The Act further identifies those subsets of critical habitat by reference either to "physical or biological features" (for occupied critical habitat), or to "areas" (for unoccupied critical habitat), which are found to be "essential" for "conservation of the species." *Ibid.* Given those definitions, the conclusion readily follows that an "area" may qualify as "habitat" even if it is "outside the geographical area occupied by the species," and even if it does not currently contain the "physical or biological features" of *occupied* critical habitat. See pp. 23-24, *supra*.

Moreover, Section 4 of the Act makes "*any* habitat" of the species eligible to be considered as critical habitat. 16 U.S.C. 1533(a)(3)(A)(i) (emphasis added). "Read naturally, the word 'any' has an expansive meaning, that is,

'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (citation omitted). The phrase "any habitat" thus supports the conclusion that a species may have multiple types of "habitat," and an area may constitute "habitat" even if it does not meet all of the species' needs across its entire life cycle.

That a species may require multiple "habitat[s]" or types of "habitat" also accords with common usage. For example, this Court and other courts have frequently used the term "habitat" to describe areas that a species uses only seasonally or for one purpose, even though it does not contain every feature necessary for a species' existence. See, *e.g.*, *Murr* v. *Wisconsin*, 137 S. Ct. 1933, 1955 (2017) (Roberts, C.J., dissenting) ("nesting habitat" for turtles); *SWANCC*, 531 U.S. at 172 ("habitat for migratory birds"); *Marsh* v. *Oregon Nat. Res. Council*, 490 U.S. 360, 367 (1989) ("spawning habitat" for fish); *Baldwin* v. *Fish & Game Comm'n*, 436 U.S. 371, 376 (1978) ("winter habitat" for elk); *Oregon Nat. Res. Council* v. *Allen*, 476 F.3d 1031, 1034 n.4 (9th Cir. 2007) ("dispersal habitat" that was "marginal or unsuitable for nesting, roosting or foraging"). Similarly, Congress has used the term "habitat" in other conservation statutes to refer to areas that may not include all elements necessary for survival throughout all life stages. See, *e.g.*, 16 U.S.C. 6602(2), 6603(b)(1)(A) ("nesting habitats" of marine turtles); 16 U.S.C. 3501(a)(1)(B) ("habitats which are essential spawning, nursery, nesting, and feeding areas"); 16 U.S.C. 1440(b)(1)(B) (authorizing Secretary to "enhance degraded habitats").

It is also conventional to use "habitat" to refer to an area that would support one of a species' life functions even if it is no longer naturally accessible. For example,

Congress has authorized the Secretary to "promote access to blocked * * * habitats" for fish spawning. 16 U.S.C. 460ss-1(b)(2)(B)(i). As a result, many salmon now access their spawning habitat using fish ladders, and juveniles may then be transported downstream on barges or trucks. See, *e.g.*, *Wild Fish Conservancy* v. *Salazar*, 628 F.3d 513, 520 (9th Cir. 2010). These usages show that the term "habitat" is not inherently confined to areas "accessible to the species" without any human intervention. Markle Br. 27.

In addition, the Service's understanding that even poor-quality habitat is nonetheless "habitat" is supported by the Act's definition of "conservation." Conservation includes "the use of all methods and procedures" calculated to achieve a species' recovery from endangered or threatened status, including but not limited to "activities associated with scientific resources management" such as "habitat * * * maintenance" and "transplantation." 16 U.S.C. 1532(3). If an area had to contain optimal conditions before it could even qualify as "habitat," the Act's contemplation that habitat may need restoration for recovery of the species would have little meaning.

Finally, the Service's interpretation of "habitat" is consistent with the Act's expressly stated purposes. Congress intended the Act to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. 1531(b).[6] Congress considered the "destruction of criti-

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[6] This Court has looked to the Act's stated purposes and supporting legislative record in interpreting other provisions. See, *e.g.*, *Babbitt* v. *Sweet Home Chapter of Communities for a Great Or.*,

cal habitat" to be the "most significant" threat to conservation of species, H.R. Rep. No. 412, 93d Cong., 1st Sess. 5 (1973) (*1973 House Report*), and the "intent and purpose" of the Act was to ensure the government's ability to protect areas needed for conservation, *ibid.*; see also *1978 House Report* 5. Those purposes are furthered by an interpretation of "habitat" that accounts for varying kinds of habitat and degrees of habitat quality and the common-sense proposition that a species may be endangered or threatened precisely because of an absence of optimal habitat. See 16 U.S.C. 1533(a)(1)(A) (identifying "present or threatened destruction, modification, or curtailment of its habitat" as a "factor[]" justifying listing a species).

c. At a minimum, the Service's interpretation of "habitat" is reasonable and entitled to deference. "When it enacted the ESA, Congress delegated broad administrative and interpretive power to the Secretary." *Babbitt* v. *Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 708 (1995) (*Sweet Home*). As this Court has recognized, the protection of endangered and threatened species "requires an expertise and attention to detail that exceeds the normal province of Congress," *ibid.*, and the proper interpretation of its terms presents "complex policy choice[s]," *ibid.* Accordingly, this Court has recognized that the Service's interpretation of the Act is entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), so long as it "rests on a permissible construction of the

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515 U.S. 687, 698-699 (1995) (upholding interpretation of "take" as including habitat modification because it furthered Act's "central purposes"); *Tennessee Valley Auth.* v. *Hill*, 437 U.S. 153, 174 (1978) (legislative record "indicate[d] beyond doubt that Congress intended endangered species to be afforded the highest of priorities").

ESA." *Sweet Home*, 515 U.S. at 704. For the reasons discussed above, the Service's understanding of "habitat" is, at a minimum, reasonable and entitled to deference.

d. Petitioner's principal argument to the contrary (Br. 21-29) is that Unit 1 is not "habitable" because it does not currently contain the three PCEs that the Service has identified as essential for "conservation" of the dusky gopher frog. As explained above, however, that argument erroneously conflates the heightened standard for occupied critical habitat—which the Service has defined in terms of PCEs—with the baseline to qualify as habitat.

In support of its unduly narrow interpretation, petitioner also relies upon certain dictionary definitions that define "habitat" in reference to a species' actual or usual occupancy. See, *e.g.*, *American Heritage Dictionary* 586 (2d ed. 1982) ("area or type of environment in which an organism or biological population normally lives or occurs"); *Webster's Third New International Dictionary* 1017 (1976) (*Webster's Third*) ("place where a plant or animal species naturally lives and grows"). But this Court has recognized that "[w]hether a statutory term is unambiguous * * * does not turn solely on dictionary definitions," *Yates* v. *United States*, 135 S. Ct. 1074, 1081 (2015), in part because they fail to account for "the specific context in which that language is used," *id.* at 1082 (quoting *Robinson*, 519 U.S. at 341). Here, the Act expressly provides that an area may form part of a species' "critical habitat" (and therefore necessarily part of its "habitat") even though it is "outside the geographical area occupied by the species." 16 U.S.C. 1532(5)(A)(ii).

In any event, dictionary definitions confirm that "habitat" does not have one single, indisputable meaning. "Habitat" is "[s]ometimes applied to the *geographical*

area over which [a plant or animal] extends, or the special locality to which it is confined," or "to the particular *station* or spot in which a specimen is found." *Oxford English Dictionary* 995 (2d ed. 1989). But other times it "indicate[s] the kind of locality, as the sea-shore, rocky cliffs, chalk hills, or the like." *Ibid.* See also, *e.g.*, *Webster's Third* 1017 ("the kind of site or region with respect to physical features (as soil, weather, elevation) naturally or normally *preferred* by a biological species") (emphasis added); *Random House College Dictionary* 591 (1980) ("1. the native environment of an animal or plant; the kind of place that is natural for the life and growth of an animal or plant."). The latter definitions readily encompass the Service's application of the term "habitat" here.

B. Unit 1 Is "Essential For The Conservation Of The Species"

Petitioner also renews its challenge (Pet. Br. 19-20, 27; see Markle Br. 28-31) to the Service's determination that Unit 1 is "essential for the conservation of" the dusky gopher frog, 16 U.S.C. 1532(5)(A)(ii). That challenge is similarly without merit.

As noted (pp. 2-3, *supra*), the Act establishes distinct standards for occupied and unoccupied critical habitat. "[O]ccupied" critical habitat consists of specific areas that contain "those physical or biological features" that are "essential to the conservation of the species" and "which may require special management considerations or protection." 16 U.S.C. 1532(5)(A)(i). So long as an occupied area contains those features, it may properly be designated as "critical habitat" without regard to other criteria, such as the area's relative importance within overall conservation efforts.

Unoccupied critical habitat is defined differently. Instead of depending upon the presence of features on lands

that may otherwise be fungible, unoccupied critical habitat includes only "areas" that themselves are found to be "essential for the conservation of the species." 16 U.S.C. 1532(5)(A)(ii). The Service's determination that a particular area meets that standard is of course informed by its particular characteristics, such as the presence of rare and valuable elements like the ephemeral ponds on Unit 1. But the test for unoccupied critical habitat ultimately requires an assessment that the area itself is "essential" for the overall conservation of the species.

1. The Service properly determined that Unit 1 is essential for the dusky gopher frog's recovery

The Service's findings about Unit 1 and the conservation needs of the dusky gopher frog, taken together, amply support the Service's determination that Unit 1 is "essential for the conservation of the species." 16 U.S.C. 1532(5)(A)(ii).

a. First, the Service found—and petitioner does not contest—that a critical-habitat designation limited to the frog's current range would be "inadequate for [its] conservation." J.A. 124; see 50 C.F.R. 424.12(e) (2012) (requiring this threshold finding). When the frog was listed as endangered in 2001, its extant population was "only 100 adult frogs at a single site." 66 Fed. Reg. at 62,995. That site—Glen's Pond—continues to contain the only "stable" frog population. *Recovery Plan* 7. Even there, the frog remains vulnerable to potential extirpation by localized disasters, droughts, or disease, such as "newly discovered fungi that have been devastating to juvenile amphibians." J.A. 46; see J.A. 157 (explaining that "population sizes are extremely small and at risk of extirpation and extinction from stochastic events'"). For this reason, peer reviewers advised that "[p]otential *R. sevosa*

translocation sites must be spread out over as wide a geographic area as possible." J.A. 13. The Service found that designating Unit 1 as critical habitat would protect against those risks. As petitioner itself notes, "Unit 1 is 50 miles from where the frog [currently] lives." Pet. Br. 14. If sites in Mississippi were "negatively affected by environmental threats or catastrophic events," Unit 1 would provide "a refuge for the frog." J.A. 125-126.

Second, Unit 1 provides "[b]reeding habitat for the dusky gopher frog in a landscape where the rarity of that habitat is a primary threat to the species." J.A. 126. Of the various habitats required for the frog's survival and recovery, none is more rare or "difficult to establish" than its breeding habitat. J.A. 122; see J.A. 125 (identifying absence of breeding habitat as "a limiting factor in dusky gopher frog recovery"). Yet Unit 1 not only retains isolated ephemeral ponds that could serve (and previously served) as breeding sites; the ponds also "are in close proximity to each other." J.A. 125. The ponds thus could support a "metapopulation structure," *i.e.*, "neighboring local populations close enough to one another that dispersing individuals could be exchanged (gene flow) at least once per generation." J.A. 147-148. Such interbreeding promotes "[g]enetic variation and diversity," which is "essential for recovery, adaptation to environmental changes, and long-term viability." J.A. 148; see *Recovery Plan* 33-34 (identifying establishment of "metapopulation in * * * *Louisiana*" as precondition for "downlisting" from endangered status).

Third, the Service found that Unit 1 was unique within the frog's historical range. Upon reviewing the "best scientific information available," the Service found that "the five ponds in Unit 1 provide breeding habitat that in its totality is not known to be present elsewhere within the

historic range of the dusky gopher frog." J.A. 125; see J.A. 160 (ponds were unmatched "in any of the areas of historical occurrence that [the Service] searched in Mississippi"); J.A. 53 (opinion of Dr. Pechmann).

Finally, the Service found that, although Unit 1 did not currently meet all three PCEs, it could attain them "with reasonable effort." J.A. 167.[7] That distinguished Unit 1 from other, historically occupied sites where restoration would not be readily feasible. See, *e.g.*, J.A. 127 (noting that "[t]he upland terrestrial habitat" at the last occupied site in Alabama "has been destroyed and replaced by a residential development"). And the Service noted that, although conservation efforts at Unit 1 would require cooperation by present or future landowners, various programs and funding sources may aid in securing that cooperation. J.A. 125.

That constellation of findings readily satisfies the "essential for * * * conservation" standard under any reasonable interpretation. Unit 1 was previously occupied by the dusky gopher frog and continues to contain the best remaining breeding habitat anywhere within its historical range. The Service properly determined that if the frog is to be successfully "conserv[ed]"—that is, brought to the "point at which the measures provided pursuant to [the Act] are no longer necessary," 16 U.S.C. 1532(3)—it is essential to protect that habitat from destruction. And

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[7] Petitioner asserts that restoration would involve "rip[ping] out [its] loblolly forests, terminat[ing] [its] century-lo g timber operations, [and] plant[ing] and grow[ing] longleaf pines." Pet. Br. 37. The Service nowhere indicated that such a wholesale transformation would be called for. Rather, it believed the uplands to "be restorable with reasonable effort." J.A. 167; see also 76 Fed. Reg. at 59,783 (same). Restoration could include, for example, creating additional holes or stumps as "frog refugia." A.R. 3080 (field notes).

when an agency's judgment rests on "scientific determination[s]" as to matters within its expertise, "a reviewing court must generally be at its most deferential." *Baltimore Gas & Elec. Co.* v. *National Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983).

b. Petitioner's various arguments to the contrary are without merit. Petitioner principally argues—contrary to its position below[8]—that an unoccupied area cannot be "essential" to "conservation" unless it simultaneously contains all of the "primary constituent elements" (PCEs) identified by the Service. Pet. Br. 27 (citation omitted); see Markle Br. 29. As the Service explained, however, see J.A. 121, the Act's text does not support that argument.

Section 3 of the Act makes the existence of specific "physical or biological features" a requirement for *occupied* critical habitat, but it omits that requirement from the immediately following definition of *unoccupied* critical habitat. See 16 U.S.C. 1532(5)(A)(ii). "Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another." *Department of Homeland Sec.* v. *MacLean*, 135 S. Ct. 913, 919 (2015). This contrast in the definitions of the two types of critical habitat supports the conclusion that an unoccupied area may be "essential" even if it currently lacks all features of the species' occupied critical habitat. See, *e.g.*, J.A. 122 ("[T]he presence of the PCEs is not a necessary element for this determination [of unoccupied critical habitat]."). Similarly, the requirement that an area be "essential for the conservation of the species" contemplates the possibility that reasonable restoration

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[8] Petitioner previously acknowledged that "it is not strictly necessary that every [unoccupied] area designated as critical habitat contain all essential habitat elements." Pet. C.A. Br. 28.

might be necessary. See 16 U.S.C. 1532(3) (defining "conservation" to include "all methods and procedures which are necessary" to assist in species' recovery).

At the very least, the Service's interpretation that an unoccupied area may be "essential" even if it does not contain all of the PCEs associated with occupied critical habitat is reasonable and entitled to deference. As with "habitat," the Act does not define the term "essential." 16 U.S.C. 1532(5)(A)(ii). Congress thus entrusted to the Service's judgment the task of reasonably interpreting and applying that standard. See *Cuozzo Speed Techs., LLC* v. *Lee*, 136 S. Ct. 2131, 2142 (2016) ("[W]here a statute leaves a 'gap' or is 'ambigu[ous],' we typically interpret it as granting the agency leeway to enact rules that are reasonable in light of the text, nature, and purpose of the statute.") (citation omitted; second set of brackets in original).

Petitioner also suggests (Br. 44-45) that Unit 1 cannot be deemed essential because, in light of its and other landowners' current opposition, the designation may not yield an immediate conservation benefit. But the Act does not contemplate that private landowners may veto a designation of critical habitat, nor demand proof of when or whether conservation efforts will ultimately succeed. Just as a lifeboat may provide "essential" protection to passengers even if it is not ultimately used, so too can Unit 1 provide "essential" protection against extinction in the event of localized disasters in other areas.

Petitioner's reliance on legislative history (Pet. Br. 8-10, 31-32; see Markle Br. 21-22, 32-35) similarly fails. As petitioner notes, the Act did not originally define the term "critical habitat." The Service issued a regulation defining it to include areas "the loss of which would ap-

preciably decrease the likelihood of the survival and recovery of a listed species," as well as "additional areas for reasonable population expansion." 43 Fed. Reg. 870, 874-875 (1978). In 1978, Congress enacted the current definition of "critical habitat." In so doing, however, Congress ultimately rejected language that would have permitted designation of unoccupied areas only if "the species can be expected to expand naturally" to those areas, *A Legislative History of the Endangered Species Act of 1973*: Senate Comm. on Environment and Public Works, 97th Cong., 2d Sess. 1169-1170 (1982) (quoting S. 2899, 95th Cong., 2d Sess. § 2 (as passed by the Senate, July 19, 1978)), or that would have excluded certain "marginal habitat" from eligibility, *id.* at 879-881 (quoting H.R. 14104, 95th Cong., 2d Sess. § 5 (as amended and passed by the House, Oct. 14, 1978)). Moreover, by framing its ultimate definition of "critical habitat" in terms of what is essential for "the *conservation* of the species," 16 U.S.C. 1532(5)(A)(i)-(ii) (emphasis added), Congress demonstrated its understanding that critical habitat would include not only areas necessary for survival, but also those necessary to recover a species from endangered status.

Petitioner mistakenly contends (Br. 35-39) that imposing atextual constraints upon the Act's definition of unoccupied critical habitat is necessary to ensure meaningful limits on the Service's authority. But such limits are furnished by the statutory requirements that the Service reasonably find that a specific area is "essential," 16 U.S.C. 1532(5)(A)(ii), and that it do so using the "best scientific data available," 16 U.S.C. 1533(b)(2). Indeed, the court of appeals upheld the Service's designation only because, "*in this case*, substantial, consensus, scien-

tific evidence in the record supports the Service's conclusion" that Unit 1 was essential for the frog's recovery. Pet. App. 30a n.20.

Petitioner's assertion that the test for unoccupied critical habitat is "*more* stringent" than that for occupied critical habitat, Pet. Br. 36 (citation omitted); see Markle Br. 30-31, is consistent with this understanding. As explained above, to designate an area as occupied critical habitat, the Service need only show that the area contains at least one of the "physical or biological features" that are "essential" to the species. *Home Builders Ass'n*, 616 F.3d at 988-989. For unoccupied critical habitat, by contrast, the Service must determine that the area itself is "essential." 16 US.C. 1532(5)(A)(ii). In practice, it will generally be easier to show that an area has a particular feature than to show that the area itself is, for example, unusually well suited to satisfy an essential conservation need.

The fact that this standard is difficult to satisfy, however, does not mean that it is impossible. Here, the Service determined, based on factors unique to Unit 1, that the area qualified as "essential for the conservation of the species," and both courts below sustained that determination after finding it to be adequately supported by the administrative record. This Court should do likewise.[9]

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[9] If petitioner identifies reason to believe that the designation of Unit 1 is no longer warranted, Section 4(b)(3) of the Act permits it to file a petition to "revise" the existing "critical habitat designation." 16 U.S.C. 1533(b)(3)(D)(i); see 50 C.F.R. 424.14(e).

2. *The Act's other conservation tools have no bearing on the Service's duty to designate critical habitat*

In an effort to minimize the consequences of its unduly narrow interpretation of critical habitat, petitioner points (Br. 39-45) to other conservation authorities set forth in the Act. But those other authorities do not limit the meaning of critical habitat.

As petitioner notes, Section 5 of the Act authorizes the Service to acquire private land for the protection of endangered or threatened species. 16 U.S.C. 1534 (2012 & Supp. IV 2016). That authority operates independently, not instead, of the designation of critical habitat. Indeed, the legislative history cited by petitioner (Br. 40) reflects that "it is beyond [the government's] capability to acquire all the habitat which is important to those species of plants and animals which are endangered today," *1973 House Report* 5, and Congress therefore provided for designation of "critical habitat" to promote species conservation on private and public lands alike.[10] This Court in *Sweet Home* rejected a similar reliance on Section 5 to support a narrow interpretation of the Act's protections of habitat, see 515 U.S. at 693, 702-703, and it should do the same here.

Petitioner's reliance on Section 6 of the Act, 16 U.S.C. 1535, is likewise unavailing. That provision allows the Service to provide funding to state governments, which may use it to support voluntary conservation activities. Again, however, the Act does not contemplate that such activities may stand in for the Service's mandatory duty

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[10] Petitioner's arguments focus on privately owned land. But their proposed limitations on "habitat" and "essential" would apparently apply equally to federal lands and would make it more difficult to protect listed species even on those lands, despite federal agencies' special responsibilities to conserve species. See 16 U.S.C. 1531(c)(1), 1536(a)(1).

to designate a species' critical habitat. In fact, the designation of critical habitat supports voluntary conservation by educating state and local governments, landowners, and the public about areas of importance to endangered species. See, *e.g.*, *Sierra Club* v. *U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 446 (5th Cir. 2001) (noting these "informational benefits"); 81 Fed. Reg. at 7226 ("Specifying the geographic location of critical habitat" helps focus "conservation programs.").

Lastly, Section 10(j) of the Act permits the Service to "authorize the release * * * of any population * * * of an endangered species or a threatened species outside the current range of such species" in order to "further the conservation of such species," 16 U.S.C. 1539(j)(2)(A), and provides that the land onto which that "experimental population" is released generally "shall not be designated" as "critical habitat," 16 U.S.C. 1539(j)(2)(C)(ii). But such a population may be released onto private land only with a landowner's consent, and petitioner has not suggested that it would be amenable to a Section 10(j) release on its property as an alternative to critical-habitat designation.

C. Petitioner's Reliance On Constitutional-Avoidance Principles Is Misplaced

In arguing that Unit 1 is neither "habitat" nor "essential" for "the conservation of the species," petitioner also invokes the canon of constitutional avoidance. See Pet. Br. 32-35; cf. Markle Br. 36-38. "Under the constitutional-avoidance canon, when statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems." *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 836 (2018). That canon is inapplicable here, however,

because the principal case petitioner relies on is inapposite; the Act is not sufficiently ambiguous to warrant departure from its text; and the doubts petitioner seeks to raise would not be "avoid[ed]" by its interpretation. *Ibid.*

First, plaintiffs argue that the designation of Unit 1 represents a potentially unconstitutional expansion of federal "jurisdiction." Markle Br. 37; see Pet. Br. 32-34. They note that, in *SWANCC*, this Court stated that "[p]ermitting [the federal agencies] to claim federal jurisdiction over ponds and mudflats" would "result in a significant impingement of the State's traditional and primary power over land and water use" without any clear indication in the Clean Water Act of such intent. 531 U.S. at 174. The Court therefore reasoned that Congress likely did not intend to extend federal regulatory jurisdiction over isolated or ephemeral waters that otherwise lacked any federal nexus.

The designation of critical habitat is materially different. A critical-habitat designation does not create federal "jurisdiction" where none otherwise exists. On the contrary, such a designation has operative effect only to the extent there exists an independent federal nexus to the land. Even then, unlike jurisdictional determinations under the Clean Water Act, the designation of land as critical habitat does not directly impose any legal obligations on private parties; instead, it imposes consultation obligations on federal agencies. 16 U.S.C. 1536(a). Congress acts well within its constitutional authority in specifying the decisionmaking processes that federal agencies must follow in administering federal programs.

Second, petitioner asserts (Pet. Br. 34-35; see Markle Br. 36-37) that excluding Unit 1 from critical habitat is necessary to avoid testing the limits of the Commerce

Clause. But the canon of constitutional avoidance does not authorize courts to override a statute's plan text. See, *e.g.*, *Jennings*, 138 S. Ct. at 842 (recognizing that "[i]n the absence of more than one plausible construction, the canon simply has no application") (citation and internal quotation marks omitted). And here, for the reasons discussed above, the best reading of the Act supports the Service's determination.[11]

Finally, and perhaps most importantly, petitioner does not explain how its interpretation of the Act would resolve the constitutional doubts it posits. Petitioner asserts that the designation of Unit 1 as critical habitat potentially violates the Commerce Clause because "[t]here is no interstate commerce in" the dusky gopher

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[11] In the court of appeals, petitioner "concede[d]" that the "critical-habitat provision of the ESA," properly interpreted, is "a constitutional exercise of Congress's Commerce Clause authority." Pet. App. 37a. To date, every court of appeals to consider the question has held that the Service's actions to protect intrastate species and their habitat are within Congress's power under the Commerce Clause. See *id.* at 42a; *People for Ethical Treatment of Prop. Owners* v. *United States Fish & Wildlife Serv.*, 852 F.3d 990, 1000-1008 (10th Cir. 2017), cert. denied, 138 S. Ct. 649 (2018); *San Luis & Delta-Mendota Water Auth.* v. *Salazar*, 638 F.3d 1163, 1175-1177 (9th Cir.), cert. denied, 565 U.S. 1009 (2011); *Alabama-Tombigbee Rivers Coal.* v. *Kempthorne*, 477 F.3d 1250, 1271-1277 (11th Cir. 2007), cert. denied, 552 U.S. 1097 (2008); *GDF Realty Invs., Ltd.* v. *Norton*, 326 F.3d 622, 640 (5th Cir. 2003), cert. denied, 545 U.S. 1114 (2005); *Gibbs* v. *Babbitt*, 214 F.3d 483, 497-498 (4th Cir. 2000), cert. denied, 531 U.S. 1145 (2001); *National Ass'n of Home Builders* v. *Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), cert. denied, 524 U.S. 937 (1998). Those decisions have applied, *inter alia*, the principle that intrastate activity can "be regulated as 'an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.'" *Gonzales* v. *Raich*, 545 U.S. 1, 36 (2005) (quoting *United States* v. *Lopez*, 514 U.S. 549, 561 (1995)).

frog and the frog currently "live[s] only in Mississippi." Pet. Br. 34. But plaintiffs have not denied that the Service acted "legitimately" in designating critical habitat for the frog at both occupied and unoccupied sites in Mississippi. Markle Br. 16. If petitioner were correct that designating critical habitat for intrastate species is unlawful, there is no logical reason why the (intrastate) designations in Mississippi would be permissible while the (cross-state) designation in Louisiana would not be. And constitutional concerns based upon the asserted "intrastate, noncommercial" character of the species (Markle Br. 37) logically would extend even to land that would satisfy petitioner's view of "habitat" and "essential." Petitioner's reliance on constitutional avoidance is thus misplaced.

II. THE SERVICE'S DECISION NOT TO EXERCISE ITS DISCRETIONARY AUTHORITY TO EXCLUDE UNIT 1 IS COMMITTED TO AGENCY DISCRETION BY LAW

A. The Act Provides No Meaningful Standard To Evaluate The Service's Decision Not To Exclude Land From Critical Habitat

1. The Endangered Species Act expressly authorizes judicial review of certain specified actions or failures to act by the Service and other federal agencies. See 16 U.S.C. 1540(g)(1)(A)-(C). The Act does not otherwise provide for judicial review of the Service's performance of its functions. This Court has held, however, that the Service's application of the Act's substantive regulatory requirements is generally subject to judicial review under the APA. See *Bennett* v. *Spear*, 520 U.S. 154, 175 (1997). Thus, for example, the Service's determination that an unoccupied area is "essential for the conservation of the species," 16 U.S.C. 1532(5)(A)(ii), is judicially reviewable.

Under the APA, however, judicial review is unavailable "to the extent that * * * agency action is committed to agency discretion by law." 5 U.S.C. 701(a)(2). Agency action is committed to agency discretion where, *inter alia*, the relevant statute provides "no meaningful standard against which to judge the agency's exercise of discretion." *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985); see *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971) (agency action is unreviewable "where 'statutes are drawn in such broad terms that in a given case there is no law to apply'") (quoting S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945)).

Petitioner's argument that Unit 1 should have been excluded from critical habitat rests upon Section 4(b)(2) of the Act, 16 U.S.C. 1533(b)(2). That provision contains two operative sentences. The first sentence directs that "[t]he Secretary *shall designate* critical habitat * * * on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. 1533(b)(2) (emphasis added). The second sentence provides that "[t]he Secretary *may exclude* any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." *Ibid.* (emphasis added). The Act articulates only one constraint on that discretion: the Service may not exclude an area if it "determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned." *Ibid.* Thus, while the first sentence establishes a mandatory duty to "consider[]" certain impacts, the

second sentence establishes an optional exclusion process based on a discretionary weighing of benefits.

2. The court of appeals correctly held that the Service's exercise of discretion *not* to exclude Unit 1 under the second sentence of Section 4(b)(2) was committed to agency discretion by law.

First, Section 4(b)(2)'s text provides no general instruction concerning the circumstances in which, if the Service finds the benefits of exclusion to outweigh the benefits of inclusion, the Service should exercise its discretion to either exclude or not exclude an area from the designation. The Act simply provides that, in that circumstance, the Service *may* exclude the area, so long as exclusion would not lead to extinction. It does not identify any set of cases in which the Service *should* do so. The permissive phrasing, lack of standards, and commitment to the Service's "determin[ation]" in the second sentence of Section 4(b)(2)—particularly when read in light of the mandatory provisions in the first sentence—"fairly exudes deference" and reflects Congress's judgment that the Service itself should determine when exclusion is appropriate. *Webster* v. *Doe*, 486 U.S. 592, 600 (1988).

The legislative record confirms this reading of the statutory text. Section 4(b)(2) was enacted in 1978, and its relevant language first appeared in a House bill. See H.R. 14104, § 2. The House committee stated that, under the bill, "[e]conomics and any other relevant impact shall be considered by the Secretary in setting the limits of critical habitat for such a species," and thus the "determination of critical habitat" would no longer be "a purely biological question." *1978 House Report* 17. The committee explained, however, that "[t]he Secretary is not required to give economics or any other 'relevant impact'

predominant consideration." *Ibid.* Instead, "[t]he consideration and weight given to any particular impact is *completely within the Secretary's discretion.*" *Ibid.* (emphasis added).

In some instances, an agency may supply judicially manageable standards through regulations. See, *e.g.*, *INS* v. *Yang*, 519 U.S. 26, 32 (1996). Here, however, the Service's regulations do not articulate any such standards, but instead simply reaffirm its "discretion." 50 C.F.R. 424.19(c); see 50 C.F.R. 424.19 (2012). And the agency's recent "final policy on exclusions from critical habitat" reaffirms that "the decision to exclude is always discretionary." 81 Fed. Reg. 7226, 7229 (Feb. 11, 2016); see *id.* at 7228 ("[N]othing in the Act, its implementing regulations, or this policy limits this discretion.").

In light of these considerations, both courts of appeals to have considered the question have concluded that the Service's decision not to exclude an area from critical habitat is committed to agency discretion. See Pet. App. 32a-36a; *Building Indus. Ass'n of the Bay Area* v. *United States Dep't of Commerce*, 792 F.3d 1027, 1034-1035 (9th Cir. 2015), cert. denied, 137 S. Ct. 328 (2016); *Bear Valley*, 790 F.3d at 989-990.

B. Petitioner Identifies No Meaningful Standard For Reviewing The Service's Decision Not To Exclude Unit 1

1. In contending that 5 U.S.C. 701(a)(2) does not bar review, petitioner principally relies (Br. 21, 46-47, 50) on this Court's general presumption in favor of judicial review, see *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1651 (2015), and on the APA's allowance of review for "abuse of discretion," 5 U.S.C. 706(2)(A). But this Court has made clear that the presumption favoring review may be rebutted, including where there exists "no mean-

ingful standard against which to judge the agency's exercise of discretion." *Heckler*, 470 U.S. at 830.[12] Here, as Markle acknowledges, the Act "provide[s] no 'meaningful' or 'substantive' standard by which to measure a decision not to exclude." Markle Br. 47 (capitalization and emphasis omitted). And "if no judicially manageable standards are available," it is "impossible to evaluate agency action for 'abuse of discretion.'" *Heckler*, 470 U.S. at 830; see *Building Indus. Ass'n*, 792 F.3d at 1035.

In each case relied upon by petitioner, the relevant statute provided a meaningful standard. *Mach Mining* involved statutory language providing that EEOC "shall endeavor to eliminate [an] alleged unlawful employment practice" by informal methods. 42 U.S.C. 2000e-5(b). The Court explained that the statute was worded in "mandatory, not precatory" terms, 135 S. Ct. at 1651, and "provide[d] certain concrete standards pertaining to what that endeavor must entail," *id.* at 1652. Here, however, Section 1533(b)(2) provides that the Service "may" exclude an area without supplying any such standards.

Bennett v. *Spear*, *supra*, also illustrates these principles. In *Bennett*, the Court considered a claim that the Service failed to consider the economic impact of a critical-habitat designation as required by the first sentence of Section 4(b)(2). The question presented was whether the

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[12] Markle asserts (Br. 40-44) that this Court should abandon the "*Heckler* 'no law to apply' test," citing Justice Scalia's dissent in *Webster*. But what Justice Scalia urged—and what this Court subsequently endorsed in *Lincoln* v. *Vigil*, 508 U.S. 182, 191-192 (1993)—is that the "law to apply" test is not the *exclusive* basis for determining that agency action is committed to agency discretion. See *Webster*, 486 U.S. at 607 (Scalia, J., dissenting) ("Our precedents amply show that 'commit[ment] to agency discretion by law' includes, but is not limited to, situations in which there is 'no law to apply.'") (brackets in original).

plaintiffs' claim could proceed under the Act's provision authorizing suit "where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary." 16 U.S.C. 1540(g)(1)(C). The Court held that the first sentence of Section 4(b)(2) established such a duty in providing that "[t]he Secretary *shall* designate critical habitat * * * on the basis of the best scientific data available and after taking into consideration the economic impact" of the designation. 16 U.S.C. 1533(b)(2) (emphasis added).

Petitioner emphasizes (Pet. Br. 46-47; see Markle Br. 49-51) that, in explaining why the citizen-suit provision authorized suit, *Bennett* stated that "the fact that the Secretary's ultimate decision is reviewable only for abuse of discretion does not alter the categorical *requirement* that, in arriving at his decision, he 'tak[e] into consideration the economic impact.'" 520 U.S. at 172 (citation omitted; brackets in original). No actual critical-habitat designation had been made, however, and the Court's passing reference to the "abuse of discretion" standard should not be understood to have settled open questions about the circumstances in which the Service's ultimate decision would be reviewable and, if available, under what standards. Cf. *Central Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356, 363 (2006) ("[W]e are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated.").

In any event, *Bennett*'s dictum is not necessarily inconsistent with the Service's understanding. Review for "abuse of discretion" is available in some cases, including where the Service affirmatively exercises its power under Section 4(b)(2) to exclude an area from critical habitat. In that situation, review is available to ensure that the

Service has not abused its discretion in finding the predicate for exclusion to be established, including that exclusion will not "result in the extinction of the species concerned." 16 U.S.C. 1533(b)(2). Here, however, the Service's decision *not* to exercise its authority implicates no standard that a court could apply on abuse-of-discretion review.

Petitioner asserts that it is anomalous that the Service's decision to exclude would be reviewable, but a decision not to do so would not be. Cf. Pet. Br. 49. But that result follows from the Act's structure and text. Section 4(b)(2) permits the Service to exclude an area from critical habitat only if specified statutory prerequisites are met. If the Service exercises that discretion, a court may review whether those prerequisites were satisfied. By contrast, if the Service *declines* to exercise its discretionary authority, the Act supplies no basis upon which to find an abuse of discretion. See *Bear Valley*, 790 F.3d at 989-990. This distinction between reviewable exclusions, and unreviewable decisions not to exclude, also accords with the overriding purpose of the Act to "halt and reverse the trend toward species extinction." *Sweet Home*, 515 U.S. at 699 (citation omitted); see *ibid.* (noting that this purpose is "reflected not only in the stated policies of the Act, but in literally every section of the statute") (citation omitted).

Markle's assertion (Br. 48) that cost-benefit analysis principles could provide a judicially manageable standard is incorrect. The Service's discretion to exclude exists only if it first finds that "the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." 16 U.S.C. 1533(b)(2). If the Service makes such a finding, that finding *permits*, but does not *require*, the Service to exclude an area from critical

habitat. The Service thus cannot be held to abuse its discretion in declining to exclude an area simply because the costs of designation are found to outweigh its benefits.

Finally, petitioner's assertion (Br. 54-55) that the Service erred in weighing costs and benefits offers no basis for disturbing the Service's decision. The Service concluded that "[its] economic analysis did not identify any disproportionate costs that are likely to result from the designation." J.A. 190. Petitioner argues that the Service should have given greater weight to its findings concerning economic costs and lesser weight to those concerning biological benefits. But Congress enacted Section 4(b)(2) with the understanding that "[t]he Secretary is not required to give economics or any other 'relevant impact' predominant consideration," and the "weight given to any particular impact is completely within the Secretary's discretion." *1978 House Report* 17.

In any event, as the court of appeals observed, "even were we to assume that [plaintiffs] are correct that the economic benefits of exclusion outweigh the conservation benefits of designation, the Service is still not obligated to exclude Unit 1." Pet. App. 35a. The second sentence of Section 4(b)(2) does not permit a court to compel an exclusion based simply on disagreements about the threshold weighing of costs and benefits. See *ICC* v. *Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987) (rejecting the "principle that if the agency gives a 'reviewable' reason for otherwise unreviewable action, the action becomes reviewable").

2. Petitioner's arguments also overlook that, even though the Service's application of the second sentence of Section 4(b)(2) is committed to agency discretion, its application of the first sentence is not. As *Bennett* held, claims that the Service failed to consider the "economic

impact" or "other relevant impact[s]" of its designation, as required by the first sentence, 16 U.S.C. 1533(b)(2), are reviewable.

Here, however, petitioner challenges the Service's ultimate "refus[al] to exclude Unit 1" from critical habitat, Pet. Br. 52 (capitalization and emphasis omitted), not an alleged failure to consider relevant factors. Indeed, petitioner's argument that the Service should have excluded Unit 1 largely reflects its agreement with the economic-impact scenarios discussed by the Service. See, *e.g.*, *ibid.* (invoking "[t]he Service['s] determin[ation] that designating Unit 1 as critical habitat would eliminate up to $33.9 million in present value of land").

Petitioner asserts in passing that "FWS's analysis of the economic costs of designation also was incomplete." Pet. Br. 54. That assertion does not sufficiently preserve a freestanding claim that the Service's consideration of economic impact under the first sentence of Section 4(b)(2) was arbitrary and capricious. Even if it did, however, the record shows that the Service reasonably analyzed the economic impact of its designation upon Unit 1 using methods it considered reliable. See J.A. 184-190; J.A. 63-98. Petitioner asserts that the Service did not consider "stigma costs" or "the potential loss of oil and gas production." Pet. Br. 54. But the record reflects that the Service accounted for any "potential indirect stigma effect," J.A. 91, 138, and identified the possibility of "oil and gas extraction" as a "key uncertaint[y]" that could have "[p]otentially major" economic impacts, J.A. 92-93.

C. To The Extent The Service's Decision Not To Exclude Unit 1 Is Found To Be Reviewable, It Should Be Upheld

Assuming that the Service's decision not to exclude Unit 1 is reviewable, petitioner urges (Br. 52-56) this Court to decide whether that decision was an abuse of

discretion. The court of appeals, having held the decision unreviewable, did not reach that question. If this Court concludes that abuse-of-discretion review is available, it should remand for application of that standard.

If this Court elects not to remand, it should uphold the Service's decision. Petitioner acknowledges that, if review is available, the agency should be afforded "broad latitude." Pet. Br. 49. Here the record contains a sufficient explanation of the Service's decision not to exercise its discretion to exclude Unit 1. In addition to weighing the benefits of the designation as a whole, the Service considered the specific benefits of designating Unit 1, which contains the best remaining breeding habitat for the species and would protect against stochastic risks. The Service's conclusion that the costs of designation were not "disproportionate" to its benefits must be considered in light of the uniquely valuable habitat that Unit 1 would provide. J.A. 190. And the Act did not bar the Service from relying on the "benefits" it considered. 16 U.S.C. 1533(b)(2). The Service's decision not to exclude the unique area it had just found "essential for the conservation of the species" was not an abuse of discretion.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JEFFREY H. WOOD
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
JEFFREY E. SANDBERG
Assistant to the Solicitor General
ANDREW C. MERGEN
MARY HOLLINGSWORTH
J. DAVID GUNTER II
Attorneys

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APPENDIX

1. 5 U.S.C. 701(a) provides:

Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

2. 5 U.S.C. 706 provides in pertinent part:

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

* * * * *

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

* * * * *

3. Section 2 of the Endangered Species Act of 1973 (Act), 16 U.S.C. 1531, provides in pertinent part:

Congressional findings and declaration of purposes and policy

(a) Findings

The Congress finds and declares that—

(1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation;

(2) other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction;

(3) these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people;

(4) the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction * * *

* * * * *

(G) * * * ; and

(5) encouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation's international commitments and to better safeguarding,

for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants.

(b) Purposes

The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

(c) Policy

(1) It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter.

(2) It is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.

4. Section 3 of the Act, 16 U.S.C. 1532, provides in pertinent part:

Definitions

For the purposes of this chapter—

* * * * *

(3) The terms "conserve", "conserving", and "conservation" mean to use and the use of all methods and

procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

* * * * *

(5)(A) The term "critical habitat" for a threatened or endangered species means—

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

(B) Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established as set forth in subparagraph (A) of this paragraph.

(C) Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.

(6) The term "endangered species" means any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this chapter would present an overwhelming and overriding risk to man.

* * * * *

(19) The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

(20) The term "threatened species" means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

* * * * *

5. Section 4 of the Act, 16 U.S.C. 1533, provides in pertinent part:

Determination of endangered species and threatened species

(a) Generally

(1) The Secretary shall by regulation promulgated in accordance with subsection (b) of this section determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) the present or threatened destruction, modification, or curtailment of its habitat or range;

(B) overutilization for commercial, recreational, scientific, or educational purposes;

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms; or

(E) other natural or manmade factors affecting its continued existence.

* * * * *

(3)(A) The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable—

(i) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and

(ii) may, from time-to-time thereafter as appropriate, revise such designation.

* * * * *

(b) Basis for determination

* * * * *

(2) The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

(3)

* * * * *

(D)(i) To the maximum extent practicable, within 90 days after receiving the petition of an interested person under section 553(e) of title 5, to revise a critical habitat designation, the Secretary shall make a finding as to whether the petition presents substantial scientific information indicating that the revision may be warranted. The Secretary shall promptly publish such finding in the Federal Register.

(ii) Within 12 months after receiving a petition that is found under clause (i) to present substantial information indicating that the requested revision may be warranted, the Secretary shall determine how he intends

to proceed with the requested revision, and shall promptly publish notice of such intention in the Federal Register.

* * * * *

6. Section 5 of the Act, 16 U.S.C. 1534 (2012 & Supp. IV 2016), provides:

Land acquisition

(a) **Implementation of conservation program; authorization of Secretary and Secretary of Agriculture**

The Secretary, and the Secretary of Agriculture with respect to the National Forest System, shall establish and implement a program to conserve fish, wildlife, and plants, including those which are listed as endangered species or threatened species pursuant to section 1533 of this title. To carry out such a program, the appropriate Secretary—

(1) shall utilize, the land acquisition and other authority under the Fish and Wildlife Act of 1956, as amended [16 U.S.C. 742a et seq.], the Fish and Wildlife Coordination Act, as amended [16 U.S.C. 661 et seq.], and the Migratory Bird Conservation Act [16 U.S.C. 715 et seq.], as appropriate; and

(2) is authorized to acquire by purchase, donation, or otherwise, lands, waters, or interest therein, and such authority shall be in addition to any other land acquisition authority vested in him.

(b) Availability of funds for acquisition of lands, waters, etc.

Funds made available pursuant to chapter 2003 of title 54 may be used for the purpose of acquiring lands, waters, or interests therein under subsection (a) of this section.

7. Section 6 of the Act, 16 U.S.C. 1535, provides in pertinent part:

Cooperation with States

(a) Generally

In carrying out the program authorized by this chapter, the Secretary shall cooperate to the maximum extent practicable with the States. Such cooperation shall include consultation with the States concerned before acquiring any land or water, or interest therein, for the purpose of conserving any endangered species or threatened species.

(b) Management agreements

The Secretary may enter into agreements with any State for the administration and management of any area established for the conservation of endangered species or threatened species. Any revenues derived from the administration of such areas under these agreements shall be subject to the provisions of section 715s of this title.

(c) Cooperative agreements

(1) In furtherance of the purposes of this chapter, the Secretary is authorized to enter into a cooperative agreement in accordance with this section with any State which establishes and maintains an adequate and

active program for the conservation of endangered species and threatened species. Within one hundred and twenty days after the Secretary receives a certified copy of such a proposed State program, he shall make a determination whether such program is in accordance with this chapter. Unless he determines, pursuant to this paragraph, that the State program is not in accordance with this chapter, he shall enter into a cooperative agreement with the State for the purpose of assisting in implementation of the State program. * * *

* * * * *

8. Section 7 of the Act, 16 U.S.C. 1536, provides in pertinent part:

Interagency cooperation

(a) Federal agency actions and consultations

(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence

of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

(3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.

(4) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 1533 of this title or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d) of this section.

(b) Opinion of Secretary

(1)(A) Consultation under subsection (a)(2) of this section with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency.

(B) In the case of an agency action involving a permit or license applicant, the Secretary and the Federal agency may not mutually agree to conclude consultation within a period exceeding 90 days unless the Secretary, before the close of the 90th day referred to in subparagraph (A)—

(i) if the consultation period proposed to be agreed to will end before the 150th day after the date on which consultation was initiated, submits to the applicant a written statement setting forth—

(I) the reasons why a longer period is required,

(II) the information that is required to complete the consultation, and

(III) the estimated date on which consultation will be completed; or

(ii) if the consultation period proposed to be agreed to will end 150 or more days after the date on which consultation was initiated, obtains the consent of the applicant to such period.

The Secretary and the Federal agency may mutually agree to extend a consultation period established under the preceding sentence if the Secretary, before the close of such period, obtains the consent of the applicant to the extension.

(2) Consultation under subsection (a)(3) of this section shall be concluded within such period as is agreeable to the Secretary, the Federal agency, and the applicant concerned.

(3)(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a) of this section, the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth

the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) of this section and can be taken by the Federal agency or applicant in implementing the agency action.

(B) Consultation under subsection (a)(3) of this section, and an opinion issued by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsection (a)(2) of this section, and as an opinion issued after consultation under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

(4) If after consultation under subsection (a)(2) of this section, the Secretary concludes that—

(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection;

(B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and

(C) if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to section 1371(a)(5) of this title;

the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that—

(i) specifies the impact of such incidental taking on the species,

(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,

(iii) in the case of marine mammals, specifies those measures that are necessary to comply with section 1371(a)(5) of this title with regard to such taking, and

(iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).

(c) Biological assessment

(1) To facilitate compliance with the requirements of subsection (a)(2) of this section, each Federal agency shall, with respect to any agency action of such agency for which no contract for construction has been entered into and for which no construction has begun on November 10, 1978, request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action. Such assessment shall be completed within

180 days after the date on which initiated (or within such other period as is mutually agreed to by the Secretary and such agency, except that if a permit or license applicant is involved, the 180-day period may not be extended unless such agency provides the applicant, before the close of such period, with a written statement setting forth the estimated length of the proposed extension and the reasons therefor) and, before any contract for construction is entered into and before construction is begun with respect to such action. Such assessment may be undertaken as part of a Federal agency's compliance with the requirements of section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

(2) Any person who may wish to apply for an exemption under subsection (g) of this section for that action may conduct a biological assessment to identify any endangered species or threatened species which is likely to be affected by such action. Any such biological assessment must, however, be conducted in cooperation with the Secretary and under the supervision of the appropriate Federal agency.

(d) Limitation on commitment of resources

After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.

* * * * *

9. Section 9 of the Act, 16 U.S.C. 1538, provides in pertinent part:

Prohibited acts

(a) Generally

(1) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to—

(A) import any such species into, or export any such species from the United States;

(B) take any such species within the United States or the territorial sea of the United States;

(C) take any such species upon the high seas;

(D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);

(E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(F) sell or offer for sale in interstate or foreign commerce any such species; or

(G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

* * * * *

10. Section 10 of the Act, 16 U.S.C. 1539, provides in pertinent part:

Exceptions

* * * * *

(j) Experimental populations

(1) For purposes of this subsection, the term "experimental population" means any population (including any offspring arising solely therefrom) authorized by the Secretary for release under paragraph (2), but only when, and at such times as, the population is wholly separate geographically from nonexperimental populations of the same species.

(2)(A) The Secretary may authorize the release (and the related transportation) of any population (including eggs, propagules, or individuals) of an endangered species or a threatened species outside the current range of such species if the Secretary determines that such release will further the conservation of such species.

(B) Before authorizing the release of any population under subparagraph (A), the Secretary shall by regulation identify the population and determine, on the basis of the best available information, whether or not such population is essential to the continued existence of an endangered species or a threatened species.

(C) For the purposes of this chapter, each member of an experimental population shall be treated as a threatened species; except that—

(i) solely for purposes of section 1536 of this title (other than subsection (a)(1) thereof), an experimental

population determined under subparagraph (B) to be not essential to the continued existence of a species shall be treated, except when it occurs in an area within the National Wildlife Refuge System or the National Park System, as a species proposed to be listed under section 1533 of this title; and

(ii) critical habitat shall not be designated under this chapter for any experimental population determined under subparagraph (B) to be not essential to the continued existence of a species.

(3) The Secretary, with respect to populations of endangered species or threatened species that the Secretary authorized, before October 13, 1982, for release in geographical areas separate from the other populations of such species, shall determine by regulation which of such populations are an experimental population for the purposes of this subsection and whether or not each is essential to the continued existence of an endangered species or a threatened species.

11. 50 C.F.R. 424.12 (2012) provided:

Criteria for designating critical habitat.

(a) Critical habitat shall be specified to the maximum extent prudent and determinable at the time a species is proposed for listing. If designation of critical habitat is not prudent or if critical habitat is not determinable, the reasons for not designating critical habitat will be stated in the publication of proposed and final rules listing a species. A final designation of critical habitat shall be made on the basis of the best scientific data available, after taking into consideration the probable

economic and other impacts of making such a designation in accordance with § 424.19.

(1) A designation of critical habitat is not prudent when one or both of the following situations exist:

(i) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species, or

(ii) Such designation of critical habitat would not be beneficial to the species.

(2) Critical habitat is not determinable when one or both of the following situations exist:

(i) Information sufficient to perform required analyses of the impacts of the designation is lacking, or

(ii) The biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat.

(b) In determining what areas are critical habitat, the Secretary shall consider those physical and biological features that are essential to the conservation of a given species and that may require special management considerations or protection. Such requirements include, but are not limited to the following:

(1) Space for individual and population growth, and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal; and generally;

(5) Habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

When considering the designation of critical habitat, the Secretary shall focus on the principal biological or physical constituent elements within the defined area that are essential to the conservation of the species. Known primary constituent elements shall be listed with the critical habitat description. Primary constituent elements may include, but are not limited to, the following: roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, host species or plant pollinator, geological formation, vegetation type, tide, and specific soil types.

(c) Each critical habitat area will be shown on a map, with more-detailed information discussed in the preamble of the rulemaking documents published in the FEDERAL REGISTER and made available from the lead field office of the Service responsible for such designation. Textual information may be included for purposes of clarifying or refining the location and boundaries of each area or to explain the exclusion of sites (e.g., paved roads, buildings) within the mapped area. Each area will be referenced to the State(s), county(ies), or other local government units within which all or part of the critical habitat is located. Unless otherwise indicated within the critical habitat descriptions, the names of the State(s) and county(ies) are provided for informational purposes only and do not constitute the boundaries of the area. Ephemeral reference points *(e.g.,* trees, sand

bars) shall not be used in any textual description used to clarify or refine the boundaries of critical habitat.

(d) When several habitats, each satisfying the requirements for designation as critical habitat, are located in proximity to one another, an inclusive area may be designated as critical habitat.

Example: Several dozen or more small ponds, lakes, and springs are found in a small local area. The entire area could be designated critical habitat if it were concluded that the upland areas were essential to the conservation of an aquatic species located in the ponds and lakes.

(e) The Secretary shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species.

(f) Critical habitat may be designated for those species listed as threatened or endangered but for which no critical habitat has been previously designated.

(g) Existing critical habitat may be revised according to procedures in this section as new data become available to the Secretary.

(h) Critical habitat shall not be designated within foreign countries or in other areas outside of United States jurisdiction.

12. 50 C.F.R. 424.19 (2012) provided:

Final rules—impact analysis of critical habitat.

The Secretary shall identify any significant activities that would either affect an area considered for designation as critical habitat or be likely to be affected by the designation, and shall, after proposing designation of such an area, consider the probable economic and other impacts of the designation upon proposed or ongoing activities. The Secretary may exclude any portion of such an area from the critical habitat if the benefits of such exclusion outweigh the benefits of specifying the area as part of the critical habitat. The Secretary shall not exclude any such area if, based on the best scientific and commercial data available, he determines that the failure to designate that area as critical habitat will result in the extinction of the species concerned.

13. 50 C.F.R. 424.19 currently provides:

Impact analysis and exclusions from critical habitat.

(a) At the time of publication of a proposed rule to designate critical habitat, the Secretary will make available for public comment the draft economic analysis of the designation. The draft economic analysis will be summarized in the FEDERAL REGISTER notice of the proposed designation of critical habitat.

(b) Prior to finalizing the designation of critical habitat, the Secretary will consider the probable economic, national security, and other relevant impacts of the designation upon proposed or ongoing activities. The Secretary will consider impacts at a scale that the Secretary

determines to be appropriate, and will compare the impacts with and without the designation. Impacts may be qualitatively or quantitatively described.

(c) The Secretary has discretion to exclude any particular area from the critical habitat upon a determination that the benefits of such exclusion outweigh the benefits of specifying the particular area as part of the critical habitat. In identifying those benefits, in addition to the mandatory consideration of impacts conducted pursuant to paragraph (b) of this section, the Secretary may assign the weight given to any benefits relevant to the designation of critical habitat. The Secretary, however, will not exclude any particular area if, based on the best scientific and commercial data available, the Secretary determines that the failure to designate that area as critical habitat will result in the extinction of the species concerned.